United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7211

United States Court of Appeals

For the Second Circuit.

MARIO LUBRANO,
Plaintiff-Appellant,

against

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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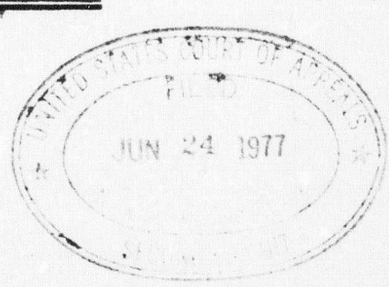

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TESTIMONY.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

- -X

MARIO LUBRANO,

Plaintiff-Appellant,

-against-

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK.

- -X

DOCKET ENTRIES.

Date	
1975	
3-25	Filed complaint and issued summons.
4-02	Filed ANSWER of deft.
4-02	Filed deft's notice to take depositions of pltf. on 4-15-75 - subp. issued.
4-10	Filed summons and Marshal's return - served. Royal Netherlands Steamship Co. by Maarten L. de Ruiter on 03-27-75.
7-16	Filed defts. interrog.
8-26	PRE-TRIAL CONFERENCE HELD BY Wenker, J.

DOCKET ENTRIES

Date	
1976	
4-20	Filed deposition of plaintiff dtd. 7-7-75. m/n
4-28	Mailed notice of reassignment of this action to Haight, J.
5-24	Filed Deft's. notice designating William M. Kimball or John G. Ingram as trial counsel.
6-07	PRE-TRIAL CONFERENCE HELD BY Haight, J. - Ready for trial - 3 days. 11-29-76. Jury case.
6-09	Filed Pre-Trial Order - Trial set for 11-29-76 at 10:00 a.m.....Haight, J. (mailed notice)
4-23	Filed pltf's answers to interrog.
10-29	Filed notice of change of address.
1977	
3-30	Trial begun and cont....
3-30	Trial concluded .... Judge grants deft motion for a directed verdict in defts favor. Complaint dismissed.
3-31	Filed judgment..that deft have judgment against pltf dismissing the complaint. judgment ent. Clerk 3-31-77. m/n
4-01	Filed memo opinion # 45754...Deft motion for directed verdict is granted and complaint is dismissed. Clerk of the Court is directed to enter judgment dismissing complaint. So ordered Haight J m/n
4-25	Filed notice of appeal by pltff from judgment of 3-31-77 to the USCA m/n
5-13	Filed defendant's trial brief.

PLAINTIFF'S NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

MARIO LUBRANO,

Plaintiff,

-against-

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant.

75 Civil 1474
Judge Haight.

- -X

NOTICE IS HEREBY GIVEN that plaintiff, Mario Lubrano, above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on March 31, 1977.

DATED: New York, New York
April 25, 1977

Yours, etc.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
By:
Office & P. O. Address
160 Broadway
New York, New York 10038

PLAINTIFF'S NOTICE OF APPEAL

TO:

BURLINGHAM, UNDERWOOD & LORD, ESQS.
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New York, New York 10004

jhds EXCERPTS FROM TRANSCRIPT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

MARIO LUBRANO, :

Plaintiff, :

-vs- : 75 Civ. 1474

ROYAL NETHERLANDS STEAMSHIP CO., :

Defendant :

----------x

B E F O R E:

HON. CHARLES S. HAIGHT, JR.,
District Judge

New York, New York
March 30, 1977--10:00 a.m.

A P P E A R A N C E S:

ZIMMERMAN & ZIMMERMAN, ESQS.,
Attorneys for Plaintiff
BY: HOWARD FISHKIN, ESQ., of Counsel

BURLINGHAM, UNDERWOOD & LORD, ESQS.,
Attorneys for Defendant
BY: WILLIAM M. KIMBALL, ESQ., of Counsel

R1 (Case called; both sides ready)

(A jury of six and two alternates was duly impaneled and sworn)

THE COURT: Ladies and gentlemen of the jury, I want to give you some preliminary instructions and a description of how the trial is going to progress and what is going to happen next.

This case will proceed in the following order: In the first phase of the trial we are going to be concerned only with the question of liability, or to use another word, the question of fault, the question of whether or not the defendant is liable to the plaintiff. It will not be until at a second stage in the trial, if you resolve the issue of liability in favor of the plaintiff, Mr. Lubrano, that we will take evidence on the question of his damages. So the first phase of the trial will be concerned with the question of liability or fault.

We proceed in cases of this nature in this manner: The plaintiff or his attorney, Mr. Fishkin, may make an opening statement outlining his case to you and then the defendant or the defendant's attorney, Mr. Kimball, may also make an opening statement outling the defendant's case. Neither party is required to make an opening statement. It is an option which they may take advantage of

or not, as they choose.

You should keep in mind that these opening statements are not evidence but are merely to aid you in understanding the significance of evidence when it is introduced.

After the opening statements, if any are made, are completed the plaintiff, Mr. Lubrano, will introduce evidence. At the conclusion of the plaintiff's evidence the defendant may introduce evidence, and if the defendant does introduce evidence, then the plaintiff may offer evidence in rebuttal.

At the conclusion of all the evidence the attorneys may make their closing arguments to you and after those closing arguments you will be given further instructions by me and you will deliberate and arrive at your verdict.

I want to stress that faithful performance by you of your duties as jurors is vital to the proper administration of justice. The law applicable to this case will be contained in the instruction I give to you during the course of the trial or at the end of the trial and the arguments and it is your duty to follow all such instructions on the law as I give you.

This brings me back to what I said at the

beginning this morning, that you and I in the course of this trial will be entering into a partnership. It is my responsibility to instruct you in the law and you must follow those instructions. It is your duty to determine the facts and to determine them from the evidence and the reasonable inferences arising from the evidence, and in doing so you must not indulge in guesswork or speculation. You are the sole judges of the facts.

I have said to you that certain things are not evidence. What is evidence? The evidence which you are to consider consists of the testimony of witnesses who will testify from this stand and who may also have testified by deposition.

A deposition is a legal device according to which a witness who has personal knowledge of the facts does not appear before you at the trial, instead he has appeared at an earlier date and has been questioned under oath by the attorneys in the case and his questions and answers have been recorded, and such depositions are read into evidence before you during the trial. I am not saying that there will be any depositions in this case. I do not know. But if there are, depositions of witnesses constitute evidence fully as much as testimony given by a witness who actually appears before you.

Evidence also consists of exhibits, written documents or other objects which may be admitted into evidence. The admission of evidence in court is governed by rules of law. From time to time it may be the duty of the attorneys to make objections to the offer of evidence and if they do it will be my duty to rule on those objections and determine whether or not you can consider certain evidence. You must not concern yourself with the objections of counsel, if made, or with the Court's reasons for these rulings. These are entirely questions of law. You must not consider testimony or exhibits to which an objection was sustained or which I may order stricken from the record.

I say again that opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against either of the parties or their counsel.

No statement or ruling or remark which I may make during the presentation of the testimony is intended to indicate my opinion as to what the facts are. I have no opinion as to what the facts are and I am never going to

have an opinion. That is solely your function. You are to determine the facts, you and you alone. In this determination you alone must decide upon the believability of the evidence and its weight and value.

In considering the weight and value of the testimony of any witness you may take into consideration the appearance, attitude and behavior of the witness. I urge you to watch whatever witnesses may appear before you carefully as they appear before you on the stand. You must consider, you may consider, the interest of the witness in the outcome of the suit, the relation of the witness to the parties, if any, the inclination of the witness to speak truthfully or not, the probability or inprobability of the witness' statements and all other facts and circumstances in the evidence.

Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive, and that process of evaluation is entirely for you to make.

There is one additional instruction, and it's very important. Until this case is submitted to you for your deliberation you must not discuss this case with anyone or remain within hearing of anyone discussing it nor read any newspaper article, listen to any radio broadcast

or view any television program which may discuss the case. And when I say that you must not discuss the case with anyone I don't mean just people on the outside of this trial, members of your family or your friends. I mean that you must not discuss it among yourselves until all the evidence is in and the case is submitted to you for your deliberations.

The reason for that rule I am sure will appear to you. How often it happens that when we have heard only part of a story or part of the facts we think we know the answer and it is not until we hear the entire story and know all the facts that we realize we are in a position to determine what it really was that happened. That is true in life and it is true in this trial, which is a part of life. Consequently, you must not discuss the case among yourselves until you hear all the evidence. And it also follows, of course, that you must keep an entirely open mind and you must not decide any issue in this case until all the evidence is in and the case is submitted to you for your deliberation under the instructions of the Court as to the applicable law.

Those constitute my preliminary instructions to you, ladies and gentlemen. We will have the opening speeches of counsel, if they care to make them, but before

doing so we will take a five-minute recess. So you may return to the jury room and then in just a few minutes we will begin with the addresses of counsel.

(Recess)

THE COURT: Mr. Fishkin, do you wish to address the jury on behalf of the plaintiff?

MR. FISHKIN: Yes, your Honor.

THE COURT: Very well.

(Mr. Fishkin made an opening statement on behalf of the plaintiff)

THE COURT: Mr. Kimball, do you wish to address the jury on behalf of the defendant?

(Mr. Kimball made an opening statement on behalf of the defendant)

THE COURT: Call your first witness, Mr. Fishkin.

MR. FISHKIN: Mr. Lubrano, please take the stand.

M A R I O L U B R A N O, the plaintiff, called as a witness in his own behalf, being first duly sworn, tesitfied as follows:

DIRECT EXAMINATION

BY MR. FISHKIN:

Q Mr. Lubrano, if you can't understand anything

I say or if you can't hear me please let me know.

Mr. Lubrano, on December 27, 1972 were you employed by the Northeast Stevedoring Company?

A Correct.

Q Were you employed as a longshoreman?

A Yes.

Q Were you employed at Pier 39 in Brooklyn?

A Yes.

Q Did you work that day on a ship called the Chiron?

A Yes.

Q What time did you report to work that day?

A 8:00 o'clock in the morning.

Q When you reported to work at 8:00 o'clock in the morning where did you go?

A Went on the ship.

Q Did you have an immediate supervisor called the hatch boss on that day?

A Yes.

Q What was his name?

A We call him Joe Ashley. I don't know. His name is William Ashley, but we call him Joey, some of the men call him Joe Ashley.

Q For how long a period of time had you worked

under Mr. Ashley prior to December 27, 1972, how long before December 27, 1972 had you worked under Mr. Ashley?

A Oh, I work with him for quite a while.

Q By that do you mean a couple of years, a couple of months?

A I don't recall exactly.

Q What were you duties, your specific duties, as a longshoreman? Did you work in the hold of the ship, on the winches, did you work on the docks; where did you work at that time?

A I was working in the hold.

Q Could you tell us what the duties of a hold man were at that time?

A Well, whatever the cargo they send them in, we got to put it away, we got to stow away whatever they tell us.

Q When you say "they" do you mean your hatch boss?

A My hatch boss or big boss that comes on deck. I don't know. They give orders to the hatch boss, they give it to us.

Q For how long a period of time had you been a hold man?

A For how long?

Q Yes, how many years.

A Twenty-nine years.

Q On the day of this accident were you loading or unloading cargo?

A We were loading.

Q What time did you start loading the cargo?

A Well, by the time we uncover the ship was approximately about 8:30, like that.

Q Where did you go on the ship after you uncovered?

A Way down below, down the lower hold.

Q Was that in the No.1 hatch?

A Yes.

Q How many men were down there with you?

A Eight.

Q Is that eight including yourself?

A Yes.

Q When you got down there was there any cargo at all?

A No, sir.

Q In the hold of the ship.

A No.

Q Can you describe what that particular hold looked like when you first got down there?

A Well, it's the bow of the ship. It comes narrow in the front and you go in it comes a little bit wider, you know. In the bow of the ship it's always narrow.

Q What was the floor made out of, if you know?

A Wood.

Q Did there come a time when cargo started to come down into the hold?

A I didn't get that.

Q Did there come a time when cargo started to come down on the winches into the hold?

A Yes.

Q What kind of cargo was that?

A Drums.

Q Drums of what, if you know?

A Tallow or grease, all full of grease.

Q Could you describe what these drums looked like?

A About 3, 3-1/2 feet, you know. I don't know how many gallons, but they were pretty heavy.

Q By that do you mean 3, 3-1/2 feet tall?

A Yes.

Q If you stood it on its end?

A Yes.

Q How did these drums come down into the hold

of the ship?

A With the chimes, chains, with the hooks, six of them in a draft.

Q How would they be lowered into the hold of the ship?

A By the winches. From the dock, they bring them down the hold.

Q When they were lowered into the hold of the ship what would the men in the hold do with them?

A What they do, four men on one side, another four men on the other side, we give one draft, and we keep going like that.

Q When you say four men on one side, could you explain what you mean by that?

A Me and another guy, we take one drum, the other two guys take another drum, and we stow them away, we roll them in in the wings.

Q Do you mean to say that you would roll them on their sides?

A Right.

Q How many men would roll one drum?

A Me and my partner, two men.

Q Where would you put the drums?

A In the after end of the ship.

Q By "after end" do you mean the back of the hatch?

A Yes.

Q How big was the square of this particular hatch, if you know?

A It's pretty small. I don't know. Really I can't tell you.

Q How large were the after wings on this ship?

A Very small.

Q How about the inshore and offshore wings?

A That's the one I'm talking about. They were very small. On the inside were a little bit room, you know, in the after end, but on this side we had no place to move. As soon as we put one drum it was filled up, you know, and you have to go in the square.

Q When you say the inside wing, this wing, by that do you mean the wing that was closest to the pier, the side of the ship that was closest to the pier?

A The side of the ship is small wings, on the after end side is a little bigger.

Q By the after end side do you mean the back, the back of the hatch?

A The back, correct, right.

Q By the inshore side do you mean the side

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

of the ship that's closes to the dock?

A On the side of the ship was very small, small wing. You put one drum, you coming out.

Q What do they call the side of the ship that is on the opposite side of the dock, what do they call that?

A That's the offshore side.

Q What type of clothes were you wearing that day?

A Was in the wintertime. I had longjohns on, pants on.

Q What kind of shoes were you wearing?

A Steel tip shoes, you know, regular working shoes.

Q Were you wearing gloves?

A Yes.

Q Were you using any other equipment?

A No.

Q Other than your hands and the gloves.

A No.

Q Will you tell us what dunnage is is. What is dunnage?

A Dunnage?

Q Yes.

A Pieces of lumber that they usually put it on

top the drums, so in order we can walk on it.

Q When you got down in the hold of the ship, before any cargo came down, was there any dunnage down there?

A No.

Q When you first got down into the hold of the ship where was Mr. Ashely, your hatch boss?

A He was standing on deck.

Q Did you see him standing on deck when you were down in the hold?

A Yes.

Q Could you tell us how you went about loading the first tier of drums into the hold of the ship? What did you do and what did the other men do?

A Well, as the drums coming in, as I say, we get one draft, the other four men get another draft, and we be putting away. We laid out the first floor, then we going on top.

Q As you were laying out the first floor, as you call it, how did you place the drums? Do you place them on their sides or on their ends?

A We were stand them up.

Q On their ends?

A Right.

Q Did you put the next drum to be stowed next to the last one?

A Right, one next to each other.

Q Did you go down the line and make rows of drums?

A Right, right.

Q At what point did you stop putting the drums in on the first tier, where in the hatch did you stop putting the drums on the first tier?

A Well, we get orders from the hatch boss, let us know, go half way. This is the hatch. You come up this far and you stop, you come up this far and that's it.

Q Somewhere in the middle of the hatch?

A Right.

Q Is that anywhere in the square of the hatch?

A In the square of the hatch, correct.

Q As you were working on the first tier can you describe to us the condition of these drums?

A They were bad, very greasy, grease all over.

Q Did you have any grease on the gloves?

A Yes.

Q What was the color of this grease?

A White.

Q Had you ever worked with these kind of drums

before?

A I never have such a job like that, believe me.

Q Do you recall ever working on this particular ship before, the Chiron?

A Yes, I was working on that ship before. Not the Chiron. They tell us where to go, but we don't know the name of the ship. It would be another Dutch ship. I don't know the name. I don't recall the name. It could be the Chiron, it could be another one.

Q But on this day you were working on the Chiron?

A On the Chiron, correct.

Q As you were loading and stowing these drums, the first tier, did you ever complain to anyone regarding the condition down there?

A Yes, we did. We all start hollering for dunnage, piece of lumber, in order to put it on top the drums, you know, to walk on, because it was very bad.

Q About how long after you started working there did you holler for the dunnage?

A As soon as we come out the square we call for dunnage, because we had -- somewhere on top, you got to stand on top the drums.

Q At any time before your accident did any dunnage come down there?

A Very few pieces.

Q How did the dunnage come down?

A By the winches.

Q About what time in the morning did the dunnage come down? You started working there at 8:30.

A As we were working we called for some dunnage. As we were working, being it was so slippery on top, we were calling for it.

Q When was the first time that dunnage came down?

A As soon as we get to the square. Very few pieces. We didn't have enough. Very scatter around.

Q How many shipments of dunnage came down?

A I don't recall that. Not enough, anyway.

Q When the dunnage came down what did you and the other men do with it?

A We placed them on the floor in order to walk on them.

Q On the floor, do you mean the top of the drums?

A On top the drums.

Q How did you do that?

A We handled. You know, we get the dunnage and we spread them right on top the drums.

Q Was there enough dunnage to entirely cover the tier that you had laid?

A No, sir.

Q Was there an area on this tier, on the first tier, that was completely covered with dunnage?

A We scatter them around.

Q Why did you scatter them around?

A Because they don't have enough. We called for it. We never got it.

Q Did you call for more dunnage after that?

A Yes, we did.

Q Did more dunnage come?

A No.

Q During the course of working down there that morning did you observe your hatch boss on the deck?

A Yes, we did.

Q Did you ever observe anybody else standing next to your hatch boss?

A It was a man standing right near the hatch boss when we ask for dunnage.

Q Then you started on the second tier, is that correct?

A Correct.

Q How did you do that, how did you start loading

and making the second tier?

A We put a few pieces, you know, whatever it was, on top the drums, we started loading the second tier.

Q Where would the drums come down on to?

A Right on top the dunnage.

Q Right on top of the first tier of drums?

A Yes.

Q Then you would do the same thing as you did before, roll them out and then stand them up?

A Correct.

Q Did you make any other complaints after you started the second tier?

A Yes, we were asking for the dunnage. He says, "Do the best you can."

Q Did any other dunnage come down to the hold after that?

A No, sir.

Q Did there come a time when you continued to place the drums on top of the first tier that you reached a point where you almost completed the second tier of drums?

A I didn't get that question.

Q I will strike the question.

How far did you get on the second tier of drums

before you had your accident?

A Oh, we have a very small hole then, you know. Instead of put six at a time they used to put four, because, you know, we couldn't work, was too much space in the square of the hatch.

Q How many more drums were there to go in place just before you had your accident?

A One.

Q Where were you at this time?

A I was right near the drums. I went by the drums, in order to pick them up, and slip right in the hole.

Q Where were you standing at this time?

A Right near the wing.

Q Were you standing on the drums?

A On top the drums.

Q Was this the second tier of drums you were standing on?

A Yes.

Q Tell us how your accident happened.

A Well, the last drums, we went to lift them up to put them in the hole, my left foot slip and went right in. The edge of the drum, was laying down flat, and I went right on top the drum.

Q Where was your hatch boss when this happened?

A He was standing on deck.

Q What caused you to slip, Mr. Lubrano?

A The grease was on it.

Q On the drums?

A On the drums.

MR. FISHKIN: I have no further questions of the witness.

CROSS-EXAMINATION

BY MR. KIMBALL:

Q Were there six drums in eac of the drafts?

A Yes.

Q And you say the drums in the draft were held with chains and hooks, is that right?

A Correct.

Q Do you know whether or not the thing which held the drums is known as a chime hook?

A That's what they call, chime hooks.

Q And these hooks hook into the rim of the drum, is that right?

A Correct.

Q And what came down in the lower hold was a cluster of six drums held with hooks?

A Correct.

Q One of your jobs when the draft got down there,

if it was for your side, was to take the hooks off so that they could lift the hooks out and repeat the job all over again, right?

A Correct, right.

Q You told us that after the hooks had been taken off the drums then the men would roll the drums to wherever they were to be stowed and put them up on end, right?

A Correct.

Q There were eight of your working down there that day, is that so?

A Yes, sir.

Q Four of you were working on one side of the lower hold and four on the other side?

A Correct.

Q And you split up into teams of two?

A Yes.

Q So you had a partner, everybody else had a partner?

A Yes, sir.

Q Two men per drum?

A Yes.

Q All eight of you were working around in this space doing what you just told us, is that correct?

A Yes.

Q You started that about say 8:30?

A About that time.

Q And you kept on going up until about 10:00 o'clock?

A Yes.

Q And by that time you had one level of drums all throughout the hold and another level of drums on top, all except just one drum, is that right?

A Correct.

Q And you say this greasy stuff, this tallow, was all over the outside of the drums?

A Correct.

Q Every drum?

A Every drum.

Q Not just one or two, but every one of them?

A Every one of them.

Q And this greasy stuff was getting on your gloves as you handled the drums?

A Yes.

Q And it was getting on the bottom of your shoes as you walked?

A Yes.

Q Is that right?

A Yes, sir.

Q Your and everybody else, isn't that right?

A Correct.

Q All the other men, same as you?

A Yes.

Q Grease on the gloves or hands?

A Yes.

Q Grease on the shoes, is that right?

A Yes.

Q And you say you hollered up to Ashley to send you dunnage?

A Correct. Not only me; everybody else.

Q I understand. All the men.

A Right.

Q Were hollering up to Ashley to send dunnage?

A Yes.

Q And at first they sent you some dunnage?

A Yes, sir.

Q You don't remember whether they sent you one bundle or more than one bundle, but anyway, it wasn't enough to cover the whole top layer?

A Yes.

Q Right?

A Yes, we all scatter them around. It wasn't

enough.

Q So then you asked for more dunnage?

A Yes.

Q And Ashley, when you asked for more dunnage, Ashley said, "Just do the best you can," is that right?

A Yes.

Q Is that right?

A Yes. Couldn't find no dunnage.

Q He said, "Just go ahead and do the best you can," is that right?

A Yes, sir.

Q You explained to us that as a hold man in that gang you took your orders from Ashley, right?

A Yes, we do.

Q He was your boss?

A Yes.

Q He was the only man who gave you orders, nobody else, just Ashley?

A At that time, yes.

Q Then there was a stevedore superintendant who gave Ashley orders?

A Was a man stand right next to him. I don't know who it was. I don't know. Was a man talking to him. He was standing on deck right next to him.

Q But you know, do you not, on the basis of some twenty years on the waterfront, that there is a ship's superintendant? I think you called him the big boss.

A Yes.

Q And he is the man who gives the orders to all the different hatch bosses?

A Correct.

Q Is it true that you were the only man of all of these eight hold men who had an accident that morning?

A At the time that I was there I was the only one, up to 10:00 o'clock. Later on I don't know, because I went to a doctor.

Q Because you left after 10:00 o'clock?

A Yes.

Q Between 8:30 and 10:00 o'clock --

A I was the only one.

Q -- you were the only one?

A Correct.

MR. KIMBALL: Thank you.

THE COURT: Redirect?

MR. FISHKIN: Yes, sir.

REDIRECT EXAMINATION

BY MR. FISHKIN:

Q Mr. Lubrano, at the time you had your accident

was there any other person down there, any other member of your gang, helping you put the last drum in place?

A Yes, was me and the other guy.

Q Where was the other man?

A The drums, one on this side, he was standing right next to me.

Q Was there any dunnage on top of the second tier of drums?

A Very few pieces, where we land the draft.

Q Were you standing on another drum at the time you had your accident?

A Yes.

Q Was there any dunnage on top of this particular drum?

A No, sir.

Q At the time of your accident, other than you and the other man who was helping you, where were the other men?

A Right next to me. The others?

Q The other men, the other six hold men, where were they?

A They were on the side.

Q Were they standing there, somewhere in the hold?

A Yes, they were standing right there in the hold.

Q Were they standing on the square, somewhere in the square of the hatch?

A Somewhere around. They couldn't go nowhere.

Q Were they standing on the floor of the ship, the actual wood floor of the ship?

A Some were -- they were standing, yes, not too far from where we were working. You know what I mean?

Q Prior to your accident, from the time you started walking on top of the drums, did you ever slip on top of these drums?

A We were walking very carefully.

Q Not that you fell down, but did you ever slip?

A Occasionally, yes.

Q Did you observe any of the other men slipping on top of the drums?

A Yes.

MR. FISHKIN: No further questions.

THE COURT: Nothing further, Mr. Kimball?

MR. KIMBALL: No, sir.

THE COURT: Thank you, Mr. Lubrano. You may step down.

(Witness excused)

MR. FISHKIN: I would like to call Mr. Ashley.

W I L L I E J O E A S H L E Y, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FISHKIN:

Q Mr. Ashley, if you can't understand what I say or you can't hear me please let me know.

What is your occupation, Mr. Ashley?

A I am a hatch boss for Northeast Stevedore, longshoreman.

Q For how long have you been a hatch boss?

A Around fifteen years.

Q What are the duties of a hatch boss?

A To watch the operation and see that the workers produce.

Q Is this done on board ships generally?

A Yes.

Q Do you have any men that work directly under you?

A Yes, I have 18 men that work under me.

Q On December 27, 1972 were you employed as a hatch boss for the Northeast Stevedoring Company?

A Yes, I was.

Q Were you working on board a ship at the 39th Street Pier on that day?

A Yes.

Q Was that ship the Chiron, a Dutch ship?

A Yes, it was.

Q What hatch were you assigned to work that day?

A No.1.

Q Is that the front hatch?

A Yes, that's the front hatch, the forward end of the ship.

Q How did you find out that your men were going to work that particular hatch?

A Well, we are assigned in the morning by the stevedores. They tell us where we supposed to go.

Q The stevedore, is that a man who works for Northeast?

A Yes, that's the ship's foreman for Northeast, the head stevedore.

Q Is he your immediate supervisor?

A Yes, he is.

Q Was Mario Lubrano a member of your gang at that time?

A Yes.

Q Is he what we call a steady member of your

gang?

A Yes, he was a steady hold man.

Q Could you tell us what is meant by a steady hold man?

A Well, we have eight men working the hold, four on the dock and four on deck. Lubrano was one of the ones that worked in the hold.

Q If you could recall, how long was Mario Lubrano a member of your gang prior to December 27, 1972?

A Offhand, I would say about five or six months.

Q Was it your job to assist in the loading operation of the No.1 hatch that day?

A Yes.

Q Do you know what kind of cargo you were going to load in that No.1 hatch?

A We had drums of tallow.

Q How did you find out before you started to load it the type of cargo you would be loading?

A From the stevedores.

Q Do you mean your immediate supervisor?

A Yes.

Q Do you know how he found out what type of cargo was going to be loaded?

A Well, they have a manifest that they go by

between the ship --

Q I couldn't hear your answer.

A They makes a plan that they go by between the shippers and the stevedores, how they going to load the ship.

Q Who makes that plan?

A I think the plan comes from the Port Captain.

Q Who is the Port Captain employed by?

MR. KIMBALL: If your Honor please, I move to strike that, not having any probative value, speculation.

THE COURT: Yes. I don't think it's sufficiently established, Mr. Fishkin, that this witness knows how the plan is prepared. I will direct the jury to disregard the last answer.

MR. FISHKIN: Your Honor, I believe I asked him not how it's prepared, but who prepares it.

THE COURT: Yes, but I am not satisfied by the extent of his knowledge.

Q What time did the gang get to the ship that morning?

A About 8:00, ten minutes after 8:00. We checks in at 8:00 o'clock. It would be about ten minutes to walk over to the ship.

Q What is the first thing the longshoremen do

when they come on board a ship that's going to be loaded?

A The first thing they do is that the deck men rig the ship up for working and the rest of the men clear off the ship, so that they have room to get in and out of the ship.

Q Excuse me. I didn't hear you.

A The rest of the men clean away the debris, if there is anything around, so they have room to work. The working area must be clear before we start.

Q After that's completed what is the next thing that happens?

A We open up and go down. We open the hatches and we go down into the hold.

Q After the men get down into the hold what is the next thing that happens?

A Well, if there is a case where we need a floor or something before we start to work we have to prepare to put our cargo down, and we put the floor down and we proceed to load drums.

Q On this day do you recall if any floor was required to be put down?

A Yes.

Q Did there come a time when cargo started to come into the hold of the ship?

A Yes, there were

Q Where were you when the cargo started to come down into the hold of the ship?

A Aboard the inshore deck.

Q Where were you in relation to the square?

A Right above it.

Q Did you have a view of the lower hold from where you were standing?

A Yes.

Q Did you have a view of the winch operators from where you were standing?

A Yes, there were.

Q Did you have a view, if you turned around, of the dock from where you were standing?

A From all points.

Q What type of cargo started to come down into the hold of the ship?

A We started to load drums of tallow. They are 50-gallon drums and they were very greasy.

Q Could you describe the grease on these drums?

A Some of the drums were overspilled from being filled and they were very messy. They are always that way, these particular type of drums with this particular stuff.

Q When did you first notice that?

A This was immediately, at the beginning of the operation.

Q Did you complain to anyone regarding the condition of these drums shortly after you saw this?

A Well, we didn't complain about the drums, except we complain about not having sufficient enough dunnage to put underneath the drums and cover up the holes of the floor. The drums we know were nasty. We had to handle them. That's cargo. We can't pick cargo, the commodity of the cargo.

Q How do you go about getting dunnage on board the ship, how do you go about acquiring dunnage?

A Well, we asked the ship did they have any more plywood. We were using some plywood at the time, but they didn't have any more plywood. So we used a few pieces of dunnage that were left over from the ship that was there before.

That morning they were waiting, because the whole ship was being started, they were waiting for a delivery of more plywood, of dunnage, whatever came.

Q Who on the ship would you ask for the dunnage?

A I presume it was one of the officers, because that was the same fellow that I had got the stevedore to speak to to see if he could get some, and they said we had

wait and do the best we can until it arrive.

Q This particular person, when you had a conversation with him for the first time, where were you and where was he?

A We were both standing on the inshore side of the ship, next to the pier, talking to the stevedore at the same time.

Q What did you say to him on that first occasion?

A Well, we asked for plywood, I mean, dunnage, and they said they didn't have it, we had to wait until it came.

Q At that first occasion did you talk with him regarding the condition of the drums?

A Yes, we spoke about the drums, how bad they were, we needed stuff to cover the holes, because the men couldn't hold the drums sufficiently to really store them, it was unsafe.

Q What did he say to you?

A We had to do the best we can until we get something that we could work with.

THE COURT: Who said that?

THE WITNESS: This was come from the stevedore and the ship. We couldn't keep the 18 men standing by doing nothing until the plywood arrived.

Q Did there come a time when you had a conversation with your immediate supervisor regarding acquiring more dunnage?

A Yes, there were.

Q In your presence did your immediate supervisor speak with someone from the ship regarding this?

A Yes, he did.

Q And in your presence do you recall what the officer of the ship stated?

A The officer of the ship stated that they had ordered and they had to wait for it.

Q About what time was that, sir?

A This is about 9:00 o'clock.

Q Between 9:00 and 10:00 did you ever observe this same officer again?

A He walked back and forth on the ship constantly, yes.

Q While you were standing at the No.1 hatch between 9:00 and 10:00 did this same officer happen to come by again?

A Occasionally, he was passing by, like I said. There is no recollection as to how many times he came back and forth looking at the ship.

Q Was it several times that he came back and

forth between 9:00 and 10:00?

A I imagine so. I can't say for sure it was several times or how many times he passed. I don't pay any attention to him unless there is something directly has to be said to him.

Q Did you ever get any more dunnage?

A I think it arrived after the accident, yes.

Q Did you witness Mr. Lubrano's accident?

A Yes, I did.

Q Were you still on deck next to the No.1 hatch at that time?

A Yes, I were.

Q What did you observe?

A I observed Mr. Lubrano trying to manipulate the last drum into position so we could finish that layer of the floor and I saw the drum slip, his feet slipped, and the drum fell on it.

These drums usually have a floor of wood underneath them to keep the metal on metal from slipping. We didn't have that. So as he was moving the drum into position, I don't know whether his feet went first or the drum went first, but the both of them went down together.

Q I believe you said you were a hatch boss for 19 years, is that correct, sir?

A No, 15 years.

Q In those 15 years have you ever handled drums of tallow?

A Yes.

Q With what frequency would you say you handled drums of tallow?

A What do you mean, what frequency?

Q How often.

A Oh, we handle them -- only when the shippers get the contract with these drums. I have handled them quite a bit.

Q Could you tell us based on your experience the condition, the general condition of tallow drums?

A The general condition with the tallow drums, if you work with a pair of gloves for a period of at least a couple of hours they are no more good, they are saturated with grease, you have to get rid of them, and the floor, when you walk, your shoes, everything gets full of this grease. This grease is everyplace. The whole place becomes just a mess.

Q As a general rule this happens when you are working with tallow drums, is that correct?

A Yes.

Q Anyone could see that if they look at it, is

that correct?

A Anyone could see that.

MR. FISHKIN: No further questions.

CROSS-EXAMINATION

BY MR. KIMBALL:

Q Mr. Ashely, I think you told us that on the basis of your experience in having handled this sort of cargo before, and presumably the experience of the regular men in your gang and, of course, the ship's foreman, it was expected when everybody heard that you were going to load drums of tallow that the job would be I believe you said messy, is that right?

A Messy, yes.

Q In other words, as soon as the word was passed that you were going to load drums of tallow you saw ahead of time what it was going to be like, the men were going to get grease on their gloves, they were going to get grease on their shoes, is that right?

A Well, you have to get it to come in contact with these drums, yes.

Q And accordingly I believe you told us that nobody complained about the condition of the drums, because this was the way drums of tallow always are, in your experience?

A Well, we complain about it. But we had to handle it. What are we going to do? We complain about it. We can't pick the cargo.

Q Before the first drum was loaded that morning I believe you testified that a floor was put on the lower hold, is that correct?

A Yes, we made two tiers of drums that morning.

Q I want to know what happened before you put even the first drum in. Was a floor laid down there to receive the first tier?

A The bottom floor of the ship is wood. So we strip of. Yes, we put a floor there.

Q When you put a floor down that morning what did you use to make the floor?

A The Dutch ship has something they make up called plyboards, I think. It's not a solid piece of plywood. It's a framed piece of board, about a half size of one of those tables, and just a few strips of wood in it, to use that for dunnage.

Q This was furnished you by the ship and it was laid down on the floor of the bottom of the hold, so that the first tier of drums could be put on top of these things, is that right?

A Yes.

Q Then you testified, I believe, that the practice, if you are going to load another tier of drums on top, is to floor off the first tier, so that you don't have one metal drum touching another metal drum, is that correct?

A As much as possible, yes.

Q Normally is dunnage used in order to make the flooring between the two drums, the two tiers?

A Yes, dunnage, plywood, whatever it is, something of that sort.

Q Some sort of wooden material, rough wood, to keep one barrel from touching another?

A Steel on steel, yes.

Q And you did not have enough dunnage or wood material in order to completely floor off the top of the first tier, is that correct?

A Second tier. We did the first tier, was on the floor.

Q That is my problem. Let's go back.

We got the bottom or what a layman would know as the floor of the lower hold, is that correct?

A Yes.

Q On top of that floor you put some pieces of wood in the first instance, is that correct?

A Yes.

Q Then on top of that wood you put drums of tallow, is that correct?

A Right.

Q Then on top of those drums you wanted to put some more wood, is that correct?

A We did, as much as we had.

Q But you didn't have enough to complete the floor off the top of the first tier of drums, is that correct?

A Yes, the top of the first tier of drums, we didn't have enough to complete the floor off, no. We had the square open, yes. The square was open, right.

Q And so in your capacity as hatch boss you requested more dunnage wood, so you could complete the flooring of the top of the first tier of drums, is that correct?

A Yes.

Q And you were told that dunnage had been ordered, additional dunnage had been ordered, and that you had to wait until it arrived, is that so?

A Yes.

Q Who told you that you had to wait?

A Who told me that we had to wait?

Q Yes.

A Well, the stevedore says that the ship -- that the Dutch had ordered the lumber and it hadn't arrived so we had to continue working until it get there.

Q In other words --

A When I say wait I don't mean that he said that we should stop work. We had to do the best we can until it got there.

Q This was the stevedore who told you that?

A Yes.

Q Who was the stevedore on that ship that day, which foreman?

A Pete Spano.

Q Petey Spano said to you, in about these words, that the ship had ordered the dunnage, you had to wait a while till the dunnage came, but meantime the men should continue working and do the best they could under the circumstances?

A Yes.

Q Of course, Petey Spano was your boss, is that right?

A That's right.

Q So he having said that to you, you did what he told you to do, as best you could, right, you relayed the same instructions to the men in the hold, they had to do

the best they could, "Keep working, do the best you can, those are the orders," is that right?

A That's right.

Q And you say some time after this accident the dunnage which you had been waiting for did arrive?

A Yes, I believe it did.

Q Incidentally, Mr. Ashley, do they keep a supply of dunnage at 39th Street Terminal?

A For who?

Q For anybody?

A For Royal Netherlands?

MR. FISHKIN: I object to the form of the questions. I don't know who "they" are.

THE COURT: Yes, I was wondering that too.

MR.KIMBALL: It's a badly framed question. I would like permission to withdraw it.

THE COURT: By all means.

Q What I want to know is over on that terminal is there a storage place where dunnage wood is kept for use by anybody who may want to use it.

A No, I don't think so. They got two companies there. One is Royal Netherlands, the other is Prudential. The Prudential have a place that they take their plywood and put it on the side, they keep their stuff, and if there

is any from Royal Netherlands, I think they leave it around and we use it where they berth, the side of the ship where they berth, but we don't take one from another.

Q If you recollection is correct, there is some place on that terminal where dunnage, what we will call Prudential dunnage, is kept and there is some place on the terminal where Royal dunnage is kept, and you don't use one for the other's ship?

A I can't recall any place on the pier where Royal dunnage is kept, not since I been there. They usually have it aboard the ship and they take it from one hold and put it in the other. If not, they wait till it comes in.

The only one that had the big supply usually of plywood there is Prudential, and they keep theirs in a separate place.

Q But when you say that Pete Spano had told you that dunnage had been ordered by the ship, would that be ordered from Northeast or ordered from some other company that furnishes the dunnage?

A This is what the officer had told Pete Spano, that they had ordered it that morning, they had to wait till it arrived.

Q Ordered it from whom, do you know, on the basis of your experience on the waterfront?

A Yes, from the lumberyard.

Q In other words, there is a company other than Northeast which furnishes dunnage wood?

A Yes.

Q And Northeast is not in the business of selling dunnage wood, is that correct?

A That's right.

Q Another company, unrelated to Northeast, is in that business, is that right?

A That's right.

MR. KIMBALL: Thank you.

THE COURT: Redirect?

MR.FISHKIN: No redirect, your Honor.

THE COURT: All right. Thank you, Mr. Ashley. You are excused.

THE WITNESS: Thank you.

(Witness excused)

R3 MR. FISHKIN: Plaintiff rests on liability, your Honor.

THE COURT: Plaintiff rests on liability.

MR.KIMBALL: Defendant rests on liability, your Honor.

THE COURT: All right.

What that means, ladies and gentlemen, is that

you have heard all the evidence that is going to be produced at this trial on the question of liability. It is that question which you will first determine. But as I said earlier in the morning, there will be certain procedures that will take place before you begin your deliberations on the question of liability.

First of all, counsel will have opportunities to make further arguments to you now that the evidence on this issue is in, and then finally, before you begin your deliberations on the liability issue, you will receive my instructions on the law on the question of liability.

Before I give you my instructions on the law I will meet with counsel in order to discuss with them whatever requests they may wish to give me as to what my instructions on the law should contain, and those discussions and my rulings on that question take place before counsel make their closing addresses. So that we will go directly from the closing speeches of counsel into my instructions on this issue and then your deliberations.

Now, what does all this mean? What it means in the first instance is that I am going to dismiss you for lunch now. Counsel will have to do some conferring before we come back for speeches and instructions. I would think that in the circumstances the most sensible thing to

do is to ask you to be back here at 2:30 promptly. That's a longer lunch hour than we usually take, but the reason for it arises from the fact that counsel and the Court have some discussing to do before we are ready to come back before you again, and it's a nice day and you might be able to sit and walk around a bit.

So I will discharge you for lunch now and ask you to come back to the jury room, please, at 2:30 promptly. If we are not entirely ready to meet with you again at 2:30, just be patient and we will get back to you as quickly as we can.

Remember, please, my instructions not to discuss this case among yourselves or with anyone else until you have commenced your deliberations.

(Jury left the courtroom)

THE COURT: I suggest, gentlemen, that we get together at 2:00 o'clock for discussions on the requests to charge and the Court's rulings thereon. Is that agreeable?

MR. FISHKIN: It's agreeable, your Honor.

MR. KIMBALL: There are motions at whatever time your Honor is prepared to take them.

THE COURT: I will receive them now.

MR. KIMBALL: If your Honor pleases, the

defendant moves to dismiss this action or moves for a directed verdict of no liability. This case is being tried to your Honor to illustrate, hopefully, why although the Napoli decision by the Second Circuit court, 536 Fed.2d 505, may, under what I suspect was inadequately presented facts of that case, may be good law, Napoli is inapplicable in this case, and in this case the law is as inartistically stated in defendant's request No.22, namely, all the defendant had to do here to avoid going to a jury on the issue of negligence is persuade the Court beyond a reasonable doubt that the defenant satisfied a simple obligation to warn this plaintiff of any latent defect. That's all we had to do to obtain a directed verdict in our favor in this case.

Now, since the defect here was, by unanimity of witnesses, grossly patent, the defendant had no duty at all to this plaintiff, none at all. No legal obligation whatsoever was owed by the defendant to this plaintiff.

Now, Napoli goes off on the tangent that while it's true that landowners satisfy their common law obligations to persons similarly situated to longshoremen on ships by warning of latent dangers which the landowner knows about or should know about and which the licensee or invitee -- it makes no difference, I suppose -- doesn't know about and reasonably should not know about, Napoli goes on and says

but if the landowner or ship owner ought reasonably to know that the longshoremen will continue to expose themselves to a patent defect, then the ship owner may have a larger duty than merely to warn of what the longshoremen already know, the ship owner may have a larger duty of rectifying the condition, or at least a jury might so find.

The reason that is bad law in this case is because of other law which we cited here at various places. I refer your Honor to our requests Nos.13, 14, 15, 18 and 21, which I respectfully submit to your Honor preclude the possibility of permitting this or any other jury to find that this ship owner knew or reasonably should have known that the longshoremen would persist in working in the teeth of the claimed dangerous conditions which existed here.

Simply, I hope, and practically put, the situation is as follows, both in law and in the facts of this case: The law put the primary obligation on Northeast to look after the safety of its own men. There is a regulation which put that responsibility on Northeast as well as case law.

Neither this ship owner nor any other ship owner should be charged with a Napoli exception of reasonably anticipating that these expert contracting stevedores will not do what they have been hired to do and do what

the law requires them to do and do what the regulations require them to do.

The ship owner ought be entitled to assume that having paid an enormous amount of money, under compulsion of the labor laws here, to hire these guys to load and discharge ships, that they are going to do it lawfully, competently, safely, as experts, and that they are not going to persist in the teeth of dangerous conditions.

Now, here the facts buttress what I suggest, your Honor, is what the law ought to be, Napoli notwithstanding. They need dunnage in the lower hold. They need more dunnage in the lower hold. The ship advises "Okay, fellows, we ordered more dunnage. It's coming. You have to wait."

They don't wait. Mr. Spano, the ship foreman, tells the hatch boss "Don't wait, keep going, do the best you can," and in the course of doing that there was the accident to Mr. Lubrano, the plaintiff, which it was the absolute, non-delegable and sole duty of the stevedore to prevent.

Accordingly, I respectfully submit to your Honor there is no issue of liability to go to this jury.

THE COURT: Mr. Fishkin.

MR. FISHKIN: It's all a question of fact,

your Honor. To begin with, the question of fact, and I think it's resolved in the plaintiff's favor, that based on the nature of the cargo the steamship company, the defendant here, should have anticipated, when they agreed to take this cargo on some time before, most likely when the ship was overseas, that dunnage would be needed in the hold of this ship, prior to the ship even coming in, due to the nature of this cargo.

Secondly, there is no issue in this case as to what the obligations of the employer are. It could be, for argument's sake, that the obligations are exactly the same or maybe even greater than the defendant's. But we are only suing the defendant. We are only interested in what the defendant's obligations are under the law, under the Napoli decision, and under the law which the Napoli decision follows and interprets.

We are dealing here with an open condition in which the plaintiff is required to work. The law is that the defendant must supply a safe place to work and must anticipate dangers such as this and should have anticipated it and should have corrected it, and they didn't. I don't think there is an issue in this case that the defendant was not aware of the condition.

In fact, there is no testimony in this case

of any contributory negligence on the part of the plaintiff in this case, and I move to strike the affirmative defenses that the defendant has interposed on that.

This is a pure question of fact as to whether or not the defendant has fulfilled its obligation to the plaintiff. That's a jury question, your Honor.

Under those circumstances I move that the defendant's motion be denied and that my cross-motion be granted as it pertains to the question of contributory negligence of the plaintiff. There is none in this case. The defendant has failed in its burden to prove that.

THE COURT: I reserve judgment on both motions and I will meet with counsel at 2:00 o'clock to consider the requests to charge. I suggest that we have that meeting in chambers, Room 2904. It's a little better up there. I will see you then.

(Luncheon recess)

AFTERNOON SESSION

2:35 p.m.

(In open court; jury not present)

THE COURT: The Court is ready to rule on the motions that were made at the conclusion of the plaintiff's case.

I have concluded that the defendant's motion for a directed verdict made pursuant to Rule 50(a), Federal Rules of Civil Procedure, must be granted.

I do not propose to set forth my reasons in detail at this time. By noon on Friday there will be available to counsel a written opinion granting the motion and setting for the Court's reasoning.

It is sufficient to say for the present that under familiar rules of law the plaintiff cannot complain of an injury received as the result of his proceeding in the face of an obvious and known danger unless the plaintiff on all the evidence in the case comes within the last phrase appearing in Section 343(a) of the Restatement of Torts, as interpreted and applied by the Second Circuit Court of Appeals in Napoli vs. Trans Pacific Carriers Corporation, 536 Fed.2d 505.

I have concluded that viewing the evidence in the light most favorable to the plaintiff, the potential grounds for a ship owner's liability arising out of that section of the Restatement and the Napoli case are not present in the case at bar and that the jury could not permissibly conclude otherwise. Accordingly, an order will be entered dismissing the complaint.

Mr. Farley, will you be kind enough to bring the jurors in so that I may dismiss them.

(Jury present)

THE COURT: Ladies and gentlemen, I have a report to give to you. I have granted a motion made by the defendant to dismiss the complaint in this action as a matter of law. Consequently, there will not be the necessity for you to decide any questions of fact, and in a moment I am going to dismiss you from service in this case and in this courtroom. But I want before doing so to explain to you a little bit more what has happened.

I said to you that you were the judges of the fact but that I was responsible for the law and for the application of the law to the facts of the case. What I have done and its consequences are not inconsistent with that division of responsibility. However, one of the functions of the trial judge is to consider whether as a

matter of law there are sufficient facts in the evidence to permit the jury to consider thecase. That requires a consideration of the evidence on the facts by me, but that consideration takes place within the context of determining whether or not as a matter of law there is a possible basis for liability. That is a responsibility that falls upon the District Judge. His resolution of that question is, in essence, the resolution of a question of law, and that is the resolution that I have made in this case.

So it remains for me only to say that I am grateful for your presence here today. The fact that the case has been disposed of in this manner should not be interpreted by you as meaning that your own efforts and service have played no part in this case. That is not so. It was essential that you be here, that you be willing to serve in this case, that you be impaneled as a juror, that you be present to receive the evidence, and that you participate in the manner in which jurors do in the case. Its ultimate resolution does not involve your further participation, but it does not follow from that that your participation up until now has not been valuable. It has been not only valuable, but absolutely necessary, and I am grateful to you for it.

I discharge you now and urge you to continue

for the balance of your term as jurors the careful attention and prompt attendance which you have shown to me. I am much obliged, and I bid you goodby.

We stand adjourned, gentlemen.

* * * *

JUDGMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

MARIO LUBRANO,

Plaintiff,

-against-

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant.

75 Civil 1474 (CSH).

- -X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Charles S. Haight, United States District Judge, and a jury, on March 30, 1977, on the issue of liability only, at the conclusion of plaintiff's evidence, defendant moves for a directed verdict for failure to prove a prima facie case, and the Court having granted the said motion, and the Court having excused the jury, it is,

JUDGMENT

ORDERED, ADJUDGED and DECREED: That defendant Royal Netherlands Steamship Company have judgment against plaintiff Mario Lubrano dismissing the complaint.

DATED: New York, N. Y.
March 31, 1977

RAYMOND A. BURGHARDT
Clerk

FILED: MAR 31 1977
U. S. DISTRICT COURT
S. D. OF N. Y.

MEMORANDUM OPINION AND ORDER BY HON. CHARLES S. HAIGHT, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

MARIO LUBRANO, :

Plaintiff, : 75 Civ. 1474-CSH

-against- :

ROYAL NETHERLANDS STEAMSHIP COMPANY, :

Defendant. "

- x

Appearances:

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HAIGHT, District Judge:

Defendant moved, at the end of plaintiff's case, for a directed verdict in its favor pursuant to Rule 50(a), F.R.Civ.P. For the reasons stated below, the motion is granted and the complaint dismissed.

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I.

Plaintiff Mario Lubrano commenced this action for personal injuries against defendant Royal Netherlands Steamship Company pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LAHWCA), 33 U.S.C. §901 et seq.[1]

The case was called for trial before a jury on March 30, 1977. At the Court's direction the trial was bifurcated, the issue of liability being tried first, and questions of damages being held in abeyance.

Plaintiff called two witnesses on the issue of liability; himself, and Willie Joe Ashley, the stevedoring hatch boss under whose direct supervision plaintiff was working when he suffered his injury. The evidence of these two witnesses may now be summarized.

On the morning of December 27, 1972, plaintiff Lubrano reported for work on board defendant's cargo vessel CHIRON, then lying at Pier 39, Brooklyn. Plaintiff was employed by Northeast Stevedoring Company, with whom the defendant shipowner had contracted to perform stevedoring services on board its vessels.

Plaintiff was a "holdman", a designation reflecting the fact that he performed his labors in the holds of vessels, rather than working on deck. During the morning in question, plaintiff and his particular gang of longshoremen, consisting of seven other men, were assigned to work in the number 1 lower hold of the CHIRON.

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Plaintiff's immediate superior was his hatch boss, Willie Joe Ashley. Ashley directed a group of 18 longshoremen, who were assigned to work at the vessel's number 1 hatch. Ashley's immediate superior was a stevedore foreman named Pete Spano, who, as in the case of plaintiff and Ashley, was an employee of Northeast. Spano's responsibility was to supervise the activities of the Northeast longshoremen throughout the vessel.

After clearing away the number 1 hatch, plaintiff and his seven fellow longshoremen descended into the number 1 lower hold, arriving there at about 8:15 in the morning. It was intended to load a cargo of drums of tallow in the lower hold. In order to prepare the hold for the cargo, the longshoremen laid down a wooden flooring, the wood being supplied by the vessel.

After this flooring was laid down, the drums of tallow were raised from the pier and lowered into the hold, by means of the vessel's winches. These metal drums stood about 3-1/2 feet high, and contained about 55 gallons of tallow.

Tallow is a greasy, highly slippery substance. The exterior of the drums being loaded into the CHIRON were covered with tallow, and in consequence the drums were themselves slippery.

The drums were lowered into the lower hold in drafts of 6 drums each. When such a draft reached the bottom of the hold, two longshoremen would roll each drum into a wing of the hold, and then stand the drum on end. Eventually a tier of drums,

covering the entire floor of the hold and filling the wings and the square of the hatch, had been arranged, the drums standing on end and next to each other.

In the course of handling these drums, the longshoremen's gloves became saturated with greasy tallow, and their shoes became covered with the substance.

It was also intended to stow a second tier of drums upon the first tier. Before doing so, it was necessary to lay a floor of dunnage upon the top of the first tier of drums. "Dunnage" consists of pieces of rough lumber or plywood. Its purpose, in the circumstances of the case at bar, was twofold: to separate the tiers of drums and so prevent the contact of "metal on metal"; and to serve as a layer upon which the longshoremen could stand, walk and work as they put the second tier into place. This latter function served as a safety factor for them, since, as noted supra, the tops of the drums were slippery with tallow, and so, after they had been working in the hold for awhile, were the soles of the longshoremen's shoes.

When the first tier of drums was in position, the longshoremen requested dunnage to be used for these purposes. Some dunnage was forthcoming, supplied by the vessel. However, as the work progressed, it became apparent that there was insufficient dunnage to construct a layer which would completely cover the top of the first tier of drums.

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The longshoremen working in the hold, including plaintiff, immediately called this situation to the attention of Ashley, the hatch boss, who was standing on deck next to the hatch. The longshoremen shouted to Ashley that they needed more dunnage. Ashley made this need known to Spano, the stevedoring foreman, and together these two men called the necessity for more dunnage to the attention of one of the vessel's officers.

This officer advised Spano and Ashley, in substance, that those in charge of the vessel were aware of the need for more dunnage; that more dunnage had in fact been sent for; and that the longshoremen should hold off on working in the hold until the additional dunnage arrived. It was apparent from Ashley's testimony that no source of additional dunnage was immediately available to the steamship company on the pier, and that the additional dunnage would have to be brought from a lumber yard.

Notwithstanding this advice from the vessel's officer (that additional dunnage had been ordered and was on the way), coupled with his sensible suggestion (that the longshoremen wait until the dunnage had arrived before completing the second tier of drums) Spano, the stevedoring foreman, undertook to instruct Ashley that the gang in the number 1 lower hold would not be kept idle until the dunnage arrived; that they were instead to continue with their labors; and that they would just have to "do the best you can." Ashley relayed those instructions to plaintiff and his

colleagues in the lower hold, and, in obedience to those instructions the stowing of the second tier of drums continued, in the face of the hazard previously described.

Unfortunately, as he was placing the final drum in the second tier into position, plaintiff Lubrano slipped on the greasy, undunnaged metal surface of the first tier of drums. The drum then also slipped and fell against Lubrano, causing the injuries for which he brought suit.

The accident occurred at about 10:00 a.m. Sometime thereafter, the additional dunnage which the vessel owner had ordered arrived.

II.

The effects of the 1972 amendments to the LAHWCA were to create a cause of action sounding in negligence on behalf of longshoremen against the vessels upon which they work and the vessel owners, and also to make that cause of action the exclusive remedy of longshoremen against vessels or ship owners. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F. 2d 31, 40 (3rd Cir. 1975), cert. den., 423 U.S. 1054. With this legislative scuttling of the doctrine of unseaworthiness as a basis of liability, the Congress "suggested land-based principles of negligence as the standard of care for vessels boarded by dock workers." Napoli v. Transpacific Carriers Corp., et. al., 536 F. 2d 505, 507 (2d Cir. 1976).

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The case at bar presents a situation of obvious danger, fully observed and appreciated by the plaintiff and his fellow longshoremen. That danger arose from the slippery grease which covered the drums of tallow being loaded and stowed in the vessel. Precisely because plaintiff observed and appreciated the resulting danger, he joined with his fellow longshoremen in urgent requests that additional dunnage be supplied, so that the first tier of drums could be entirely covered by dunnage, rather than leaving certain areas exposed, with resultant risk that the longshoremen's feet might slip upon them.

Earlier authorities gave rise to "the traditional rule of land-based negligence which is in substance that there is no obligation to warn an invitee of dangers which are known to him or which are so obvious that he may reasonably be expected to discover them himself." Napoli, supra at 536 F. 2d p. 508. It was a corollary of that rule that an individual who continues in his activities, in disregard of such a danger, could not hold a landowner liable for injuries which were suffered in consequence. That traditional rule of negligence inspired the district court's charge to the jury in Napoli which formed the basis of the successful appeal in that case.[2]

The Second Circuit reversed a jury verdict in favor of the defendant shipowner, and remanded the case for a new trial,

because it considered that the charge quoted in the margin constituted error. Criticizing the district judge's charge in Napoli, the Second Circuit stated:

> "...a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore. Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present-day obligations owed by a landowner to one whom he invites upon his premises." 536 F. 2d at p. 508.

Since, in the case at bar, the defendant shipowner arranged with an independent contractor, Northeast, for the furnishing of stevedoring services, the first basis of criticism in Napoli, namely that "the shipowner, itself, is the stevedore", is not present. Accordingly the question presented by defendant's motion for directed verdict is whether those "present-day obligations", falling upon a landowner and, by logical extension, upon a shipowner, to protect against obvious danger, as enunciated in Napoli, operate on the facts of the present case to entitle plaintiff to a recovery which, under the traditional rules of negligence, would be denied him.

Before viewing the facts of the case at bar in this context, it is instructive to consider the facts presented in Napoli, as revealed by the opinion of the Court of Appeals. There are significant differences.

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One difference has already been noted. In Napoli the shipowner itself acted as its own stevedore. That is not the situation in the case at bar.

Secondly, the injury in Napoli occurred not as the result of an insufficiency of equipment which manifested itself as the work on board the vessel progressed; rather, the injury resulted from a condition (snow both on top of and beneath plywood boards resting on top of a deck load of drums), which apparently existed when the longshoremen commenced their work and continued throughout the performance of their labors, until the injury occurred.

Third, there is no evidence whatsoever in Napoli that the shipowner or its employees undertook to correct the dangerous condition, suggesting to the longshoremen that the work be held off until the condition had been corrected. But that is precisely, on the present plaintiff's own evidence, what happened in the case at bar.

In essence, Napoli suggests potential grounds of liability on the part of a shipowner upon which an injured longshoreman may reply, even though he proceeded in the face of an obvious danger. The question presented on the motion for directed verdict is whether the plaintiff proved any facts which would permit the jury to invoke the potential bases of liability which arise out of Napoli. That is the question which I answer in the negative.

The rationale of Napoli is based upon Section 343A of the Restatement of Torts 2d, which reads in pertinent part:

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> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

The emphasis which I have given to the last phrase of this Section was also given by the Second Circuit in Napoli. Applying the principle set forth in Section 343A to cases where longshoremen suffer injuries on vessels, the Second Circuit said:

> "In the present case, there was evidence from which a jury might conclude that the ship should reasonably have anticipated that Napoli would not be able to avoid the danger despite its obviousness. The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen. Thus, it might be argued that if this was the only place for Napoli to work and carry out his job, the vessel might reasonably anticipate that he would use it despite its obvious danger, since the only alternatives would be to leave his job or face trouble for delaying the work. Should the jury be persuaded by this argument and find that the shipowner was negligent in not correcting the open and obvious danger but that the plaintiff was contributorily negligent, it would apply the doctrine of comparative negligence to reduce the shipowner's liability proportionately." 536 F. 2d at p. 509. (emphasis added).

The Second Circuit concluded its opinion with a reinvocation of the Restatement:

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> "Accordingly, we believe that where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in §343A of the Restatement of Torts above quoted." 536 F. 2d at p. 509.

In Napoli, the Second Circuit immediately preceded the discussion which I have just quoted with this paragraph:

> "Applying such an 'obvious danger' standard does not run contrary to the intent of Congress, in passing the 1972 amendments, that principles of negligence rather than of strict liability should govern the vessel's liability. Under this rule, a vessel is liable to longshoremen only for injuries resulting from obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid." 536 F. 2d at p. 509. (emphasis added).

It is apparent from the discussion in Napoli that Section 343A of the Restatement underlies the Court's rationale. Accordingly it is instructive to consider the comments of the Restatement's draftsmen. Comment f to the Section in questions reads:

> "There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

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> "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason amy also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances." (emphasis added).

The evidence in the case at bar precludes application of the Napoli bases of shipowner's liability, grounded as they are in the principles of Section 343A of the Restatement. In Napoli, there was a total failure on the part of the shipowner to attempt to correct the known hazardous condition. In the case at bar, the shipowner undertook to obtain additional dunnage when, during the progress of the work, its necessity became apparent. There was no evidence adduced by the plaintiff from which the jury could have found that the shipowner's efforts were unreasonable.

Secondly, the case at bar does not present the situation of a longshoreman unable, in the particular circumstances confronting him, to do anything other than continue to work in the face of a known danger. As I understand Napoli, the pressures arising out of such a "Hobson's choice" lie at the

heart of the Court's rationale. In the case at bar, on plaintiff's own evidence, it was suggested by the vessel's officer to the stevedoring supervisors that the work be held off until the additional dunnage arrived. There is no evidence whatsoever that those in charge of the vessel were pressuring the longshoremen to continue work without interruption, so that, for example, the vessel might sail with the tide or in accordance with a prearranged schedule. The decision to continue work, in the face of a known hazard, and despite the knowledge that the requested additional dunnage was on the way, was made by the stevedoring supervisors; and that decision was neither requested nor participated in by the defendant or its officers.

Finally, it cannot be said that the defendant could reasonably have anticipated such action on the part of the contracting stevedore which it had retained. Because that is so, no foundation was laid in the evidence for application of that final phrase in Section 343A of the Restatement, upon which the Second Circuit laid such emphasis in Napoli, namely, that "the possessor should anticipate the harm despite such knowledge or obviousness."

A further source of instruction appears in the illustrations which the authors of the Restatement chose in respect of the basis of liability under discussion. Illustration 5 involves a slippery surface:

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> "A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C."

If we adopt that illustration so that it reflects the facts of the case at bar, the illustration would read as follows:

> "A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, contemplates the slippery waxed stairway before using it, and complains about its condition to B, who in turn complains to A, the building owner. A advises B that he has requested the services of a stairway-maintenance company, whose representatives are on the way. A suggests to B that C wait until the condition has been remedied, but B, notwithstanding the foregoing, directs C to climb the stairway and report for work. C, doing so, slips on the stairway and is injured."

The imposition of liability upon A in such an illustration, and equally, the imposition of liability upon the defendant shipowner in the case at bar, cannot be justified by appeal to the Restatement or to the decision in Napoli. On the contrary, such an imposition of liability would do violence to principles of negligence law reflected in those very authorities.

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As noted supra, in Napoli the Second Circuit took pains to point out that application of the Restatement's "obvious danger" standard in LAHWCA cases would not contravene the Congressional intent, expressed in the 1972 amendments, that a vessel owner is liable to longshoremen "only for injuries resulting from obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid." 536 F. 2d at p. 509. Furthermore, liability under Napoli requires a showing that "the shipowner was negligent in not correcting the open and obvious danger..." Ibid. The plaintiff bears the burden of establishing both elements. In the case at bar there was a total failure of proof as to each of them. Defendant had no reason to anticipate that the longshoremen would not await the additional dunnage, which would have enabled them to avoid the hazard; and there is no evidence that defendant's efforts to obtain more dunnage, in order to correct the danger, were less than they could have been in the circumstances.[3] A jury could not find for plaintiff on this state of the record without departing from the guiding principles of the statute.[4]

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III.

For the foregoing reasons, defendant's motion for directed verdict is granted. The Clerk of the Court is directed to enter judgment dismissing the complaint.

It is So Ordered.

Dated: New York, New York
March 31, 1977

CHARLES S. HAIGHT, JR.
U. S. D. J.

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Footnotes

1. Plaintiff was injured on December 27, 1972. Accordingly the 1972 amendments to LAHWCA, which became effective thirty days after the date of their enactment on October 27, 1972, govern the case.

2. The district judge in Napoli charged the jury as follows:

> "Now, if you find that the condition complained of by the plaintiff, that is permitting snow to accumulate under the plywood which caused the plywood to slip out from under him was known to the stevedore or to any of its employees, including the plaintiff, or if this condition was so open and obvious that it should have been observed, then the ship owner owes no responsibility to warn a longshoreman of the open condition. If you find such then you can not find that the defendant was negligent and you must return a verdict for the defendant." 536 F. 2d at p. 507-8.

3. It is no answer for plaintiff to say that defendant should have anticipated the need for a greater quantity of dunnage and had it on hand before work commenced. In the first place, such a finding of negligence would have to be based upon underlying findings that the shipowner knew that the drums of tallow were destined for leading on the CHIRON in sufficient time to order additional dunnage in advance, factual propositions for which there is no evidence at all. Secondly, assuming arguendo a basis for inference of such negligence, its consequence was limited to the creation of an obvious hazard of which plaintiff was aware; and so we simply return to square one.

4. The imposition of liability upon the shipowner, in the circumstances of this case, would be tantamount to a return to the discarded concept of liability based upon unseaworthiness.

Service of (1) One Copy of
Joint Appendix is hereby admitted
this 24 day of June 1977.

Atty for Respondent-Appellee

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